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No. 84-93

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN ALLEN FINE,

Petitioner,

v.

BARRY AND ENRIGHT PRODUCTIONS,
GOODSON-TODMAN PRODUCTIONS,
MERRILL HEATTER PRODUCTIONS, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
AMERICAN BROADCASTING COMPANIES, INC.,
CBS INC., and MERV GRIFFIN PRODUCTIONS,

Respondents.

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BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit erred in deciding that petitioner failed to offer any evidence tending to prove that his inability to participate in respondents' television game show programs resulted from a conspiracy among respondents in violation of the Sherman Act.

STATEMENT

Petitioner Martin Allen Fine claims that he was excluded from appearing as a contestant on respondents' televised game shows by reason of a conspiracy among respondents. Three respondents—American Broadcasting Companies, Inc. ("ABC"), CBS Inc. ("CBS"), and National Broadcasting Company, Inc. ("NBC")—televise games shows. The other four respondents are independent producers of game shows.

The theme of each of the game shows in question is a contest in which a non-expert drawn from the populace competes against another non-expert, or against a celebrity who is also not an expert in the subject matter of the contest. This theme is based on the belief that many home viewers derive enjoyment in playing the game while watching the program and comparing themselves to the contestants. The concept of the non-expert contest is the antithesis of the televised quiz shows of the 1950's that directed questions to persons known to have extensive knowledge of certain subjects (such as opera or sports), where correct answers would display great erudition. The scandal that ensued upon discovery that some of those programs were rigged led to Congressional investigations, the cancellation of programs, and the enactment of a federal statute prohibiting the rigging of game shows. 47 USC § 508 (formerly § 509).

In the wake of the quiz show scandals in the 1950's, each network adopted a strict policy designed to insure the integrity of its game shows. The policy of each provided better measures to insure that contestants did not learn the questions and answers in advance of the contests, stricter rules for interaction between celebrity and non-celebrity contestants, and restrictions declaring the ineligibility of certain classes of persons to be accepted as non-celebrities, *e.g.*, persons affiliated with the show's producer or broadcaster, and professional entertainers. *CR* 103, ¶ 7, 8; *CR* 104, ¶10.[1] With these measures in place, the networks resumed the broadcasting of game shows.

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[1] "CR" refers to the District Court Clerk's Record.

After the new game shows appeared, each network became aware, from complaining letters and telephone calls of viewers, that some persons were appearing repeatedly as contestants on numerous game shows, thereby raising, in the viewers' minds, questions as to the *bona fides* of the contests. Each network realized that additional safeguards were required, and each adopted a policy designed to protect the amateurism and spontaneity that are essential parts of the themes of their shows, as well as to protect themselves from collusion between contestants and disloyal employees.

NBC adopted its policy in the early 1960's (*CR* 104, ¶ 9); ABC adopted its policy in the mid-1960's (*CR*, 103 ¶¶ 9, 12), and CBS adopted its policy in 1972 (*CR*, 105, ¶ 6). Each has modified its policy from time to time (*CR*, 104, ¶ 9, *CR* 103, ¶¶ 9, 12, *CR* 105, ¶ 6). At various later times, some of the respondents that are game show producers adopted their own game show eligibility criteria (*CR* 103, ¶¶ 4, 6; *CR*, 103, ¶ 4).

The criteria of all respondents seek the same results—*i.e.*, to maximize program spontaneity and to minimize the danger of rigging—but the criteria differ in detail. For example, ABC limits any non-celebrity to one appearance in twelve months and two appearances in five years (*CR*, 193 ¶¶ 9, 12), while CBS limits any person to one appearance in twelve months and twice in a lifetime (*CR*, 105, ¶ 6).

Petitioner came upon the scene while a law student at Pepperdine University. In July 1978 he competed on "Tic Tac Dough," winning $5,393 in cash and prizes. (Supp. Ans. No. 38.)[2] In November 1980 he won $5,682.85 in cash and prizes on "Password Plus." *Id.* In January 1982 he was awarded $211.45 in prizes on "Blockbusters." *Id.* His application to appear on "Joker's Wild" was accepted in January 1982, but he was disqualified before appearing on the show when its producer learned that, by reason of petitioner's prior game show appearances, he did not meet that producer's eligibility criteria. (Petitioner's depo. pp. 170-172; 174-180, 465-468; petitioner's

[2] Reference to "Int. Ans." and "Supp. Ans." refer to petitioner's Answers to Interrogatories and petitioner's Supplemental Answers to Interrogatories, respectively, lodged with the District Court.

depo. ex. no. '5; Int. Ans. 36, 37.)[3] In February 1982 petitioner applied, but was not selected, to appear on "Battlestars." (Supp. Ans. No. 35.)

On February 10, 1982, petitioner filed a complaint in the United States District Court in Los Angeles, alleging that his inability to appear more frequently on televised game shows resulted from an illegal conspiracy among defendants.

Petitioner offered no evidence of a conspiracy among the three networks, or among the four independent producers of game shows. The only agreements of any kind he pointed to as supporting his claim of unlawful conspiracy are the individual contracts between networks and their game show suppliers regarding the production of particular shows. Each contract includes a promise of the supplier to adhere to the purchaser's eligibility criteria in recruiting persons for appearances on the show.

Petitioner also claimed that a conspiracy could be inferred from conscious parallel action of the respondents, but offered no evidence of parallelism other than the fact that most respondents employed eligibility policies that were similar in objective.

The District Court granted respondents' motion for summary judgment on the ground that petitioner could not show injury to his business or property as provided by section 4 of the Sherman Act. 15 U.S.C. §15. The Court of Appeals affirmed on the ground that the undisputed facts showed that there was no conspiracy in violation of the Sherman Act.

In affirming the District Court the majority of the Court of Appeals held that petitioner had not offered any evidence of an unlawful conspiracy. The third member concurred in the result on the ground that petitioner had proved no injury to business or property within the meaning of section 4 of the Sherman Act.

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[3] References to "Petitioner's depo. _____" are to pages of the transcript of petitioner's deposition, and references to "Petitioner's depo. ex. no. _____" are to exhibits attached to that transcript, lodged with the District Court.

SUMMARY OF ARGUMENT

This Court should not grant certiorari because the Court of Appeals correctly decided that petitioner did not offer any evidence tending to show a conspiracy to exclude petitioner as a television game show contestant.

ARGUMENT

1. Summary Judgment Is Proper In Antitrust Actions

Although summary judgment is to be granted cautiously in antitrust cases, *Poller* v. *CBS, Inc.*, 368 U.S. 464 (1962), it is nonetheless appropriate when a plaintiff offers no evidence to rebut averments in defendants' affidavits showing that no conspiracy occurred, or to rebut averments that the alleged restraint has no anticompetitive purpose of effect. *First Nat. Bank* v. *Cities Service Co.*, 391 U.S. 253, 284-90 *reh. denied*, 393 U.S. 901 (1968); *Ron Tonkin Gran Turismo, Inc.*, v. *Fiat Distributors, Inc.*, 637 F.2d 1376, 1381 (9th Cir. 1981), *cert. denied*, 454 U.S. 831 (1982); *Parsons* v. *Ford Motor Co.*, 669 F.2d 308 (5th Cir.), 103 S.Ct. 73 (1982); *White* v. *Hearst Corp.*, 669 F.2d 14 (1st Cir. 1982).

2. The Specification Of Contestant Eligibility Criteria In A Contract To Purchase A Television Game Show Is Not A Conspiracy In Violation Of The Sherman Act.

A. *A Contestant Eligibility Specification Is Not A Boycott.*

A network's purchase of a game show is the acquisition of a business-producing asset. The network specifies the characteristics to serve its needs. In the case here, the need of each network is for game shows that feature an ever-fresh supply of non-experts drawn from all walks of life, and that are not only free from collusion but also free from any appearance of collusion. The eligibility rules constitute the purchaser's specification to aid in obtaining shows with those characteristics. The notion that such specifications constitutes a boycott has no support in case law.

The specification of eligibility criteria is not a boycott because it is not an agreement among competitors, but a vertical agreement between purchaser and supplier. While in common parlance almost any agreement of two persons that results in their not dealing with a third is sometimes called a boycott, this Court has never condemned such an agreement unless at least two of the agreeing parties are competitors of one another. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 212-13 (1959); *Fashion Originators' Guild of America* v. *FTC,* 312 U.S. 468 (1941). In *Klor's,* as in *FOGA,* the conspirators included competing manufacturers. It would have been untenable to relieve the competing manufacturers of liability for conspiracy simply because persons at other levels of distribution also participated in the conspiracies.

Moreover, the necessity in boycott jurisprudence of proving that at least two of the conspirators are competitors is not mere formalism. Boycotts are illegal *per se. Klor's, Inc.,* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961) (per curiam). If all it took to prove a boycott was to show a refusal of any two persons to deal with a third, then every exclusive requirements contract would be a boycott, an untenable result in light of the long-established rule that such contracts are judged by the rule of reason. *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320 (1961); *Standard Oil Co. of California* v. *United States,* 337 U.S. 293 (1949). For the same reason, vertical territorial allocations would be classified as boycotts, in contravention of the holding of *Continental TV, Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36 (1977), that such allocations are governed by the rule of reason.

A second reason why the eligibility criteria in a contract to purchase a program are not a boycott is that every agreement to refuse to deal, even if among competitors, is judged by the rule of reason if the refusal is not for an anticompetitive purpose. Thus, joint ventures of competitors may not exclude others for anticompetitive reasons, *Associated Press* v. *United States,* 326 U.S. 1 (1945), but can exclude those who will not assume their aliquot shares of the burdens. *United States* v. *Terminal R.R. Ass'n.,* 224 U.S. 383, 411 (1912). (Those seeking to use

defendants' rail bridge must assume their shares of the costs.) *See also Silver* v. *New York Stock Exchange,* 373 U.S. 341, 348-49 (1963) "[A]bsent any justification derived from the policy of another statute or otherwise" exclusion from the benefits of a stock exchange would violate the Sherman Act.) Thus, if the purpose is not to restrict competition, then the refusal to deal is not classified as a boycott and is judged by the rule of reason.

In this regard, the Ninth Circuit court below accepted respondents' proof of the legitimate purpose of the eligibility criteria, a conclusion that is not surprising in light of the fact that petitioner offered no evidence whatever to contradict respondents' proof. Hence, there is nothing to support the claim that the refusals to accept petitioner as a contestant should be classified as a boycott.

B. *The Contestant Eligibility Specifications Are Not Unreasonable Restraints Of Trade.*

Petitioner offered no evidence that came close to meeting the standard of proof for showing an unreasonable restraint. There was no evidence that the eligibility criteria were for an anticompetitive purpose, and no evidence that the criteria had or could have any effect on pricing, output or otherwise on competition in any market. All that plaintiff could show was the effect of the criteria on him. That, however does not satisfy the test. The antitrust laws protect competition, not competitors. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962); *Copperweld Corp.* v. *Independence Tube Corp.,* ____ U.S.____, 104 S.Ct. 2731, 2740 n.14 (1984), and contractual restraints that exclude some persons but do not restrict price competition or limit output are not unreasonable. *Continental TV, Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 54-56 (1977); *Broadcast Music Inc.* v. *CBS, Inc.,* 441 U.S. 1, 19-20, 23 (1979); *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde,* ____U.S. ____, 104 S.Ct. 1551, 1568 (1984). *See also Board of Regents of the University of Oklahoma* v. *National Collegiate Athletic Ass'n,* ____U.S.____, 104 S.Ct. 2948, 2960-62 (1984).

C. *The Adoption Of Eligibility Criteria Does Not Constitute Conscious Parallelism That Proves A Conspiracy.*

The fact that two or more persons in the same trade take similar action proves nothing about conspiracy where each has a problem for which the same solution is indicated. For example, policies of life insurance companies routinely refuse coverage for suicides; new automobile warranties routinely have time and use limits (12,000 miles or one year, whichever comes first); television stations commonly refuse to show X-rated films; rental car companies refuse to rent cars to minors; banks refuse to lend to persons who are not creditworthy and who can offer no collateral.

Respondents gave copious evidence that their adoption of eligibility rules was intended to solve a common problem in the televising of game shows, and petitioner offered no evidence to rebut the proof that there was such a problem or to rebut the proof that the purpose of adopting eligibility criteria was to solve the problem. Petitioner has therefore fallen far short of the threshhold of proof of a conspiracy by proof of conscious parallelism.

This Court has stated that "conscious parallelism has not yet read conspiracy out of the Sherman Act entirely." *Theatre Enterprises* v. *Paramount Distrib. Corp.*, 346 U.S. 537, 540-41 (1954). In applying that rule, *First Nat. Bank* v. *Cities Service Co.*, 391 U.S. 253, 284-290 (1968), upheld the grant of summary judgment for defendant Cities Service Co. against a claim of conscious parallelism. The only evidence of "conspiracy" by Cities Service Co. was that it, like other defendants, failed to agree to purchase Iranian oil from the plaintiff. *See also, Grandad Bread, Inc.* v. *Continental Baking Co.*, 612 F.2d 1105, 1112 (9th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981); *Joseph E. Seagram & Sons, Inc.*, v. *Hawaiian Oke & Liquors Ltd.*, 416 F.2d 71, 84-85 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

In sum, petitioner has not shown conspiracy by direct evidence, by conscious parallelism or otherwise, and has not shown that respondents' eligibility criteria were anticompetitive in purpose or effect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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